

**FILED**

MAY 08 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 303578

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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TIMOTHY WEIDERT, individually and L.W. WEIDERT FARMS, INC.,  
a Washington corporation,  
Respondent-Plaintiffs,

v.

Jerald A. Hanson dba Walla Walla Insurance Services  
And Jerald and Jane Doe Hanson,  
Defendants.

And PRODUCERS AGRICULTURE INSURANCE COMPANY, a Florida  
Corporation.  
Petitioner.

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BRIEF OF RESPONDENTS

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## **I. INTRODUCTION**

The Respondent is Timothy Weidert and L.W. Weidert Farms, Inc. (hereinafter referred to collectively as “Weidert”). Appellant seeks reversal of the trial court’s decision denying Producers Agriculture Insurance Company’s (hereinafter referred to as “ProAg”) Motion to Compel Arbitration.

## **II. ASSIGNMENT OF ERROR**

1. Whether the Federal Crop Insurance Act, 7 U.S.C. § 1501, precludes state causes of action against a private insurance company reinsured by the FCIC .

2. Whether the trial court decision to deny the motion for arbitration was correct because the causes of action are outside the issues of the Arbitration Agreement.

3. Whether the trial court decision to deny the motion for arbitration was consistent with the Federal Arbitration Act, 9 U.S.C. § 2.

## **III. COUNTERSTATEMENT OF THE CASE**

This lawsuit arises out of misrepresentations and acts done by ProAg during the procurement of crop insurance coverage. The policy is reinsured by the Federal Crop Insurance Corporation (“FCIC”) under the provisions of the Federal Crop Insurance Act (“FCIA”), 7 U.S.C. § 1501, et seq. The FCIC is a wholly-owned government corporation within the Department of

Agriculture. 7 U.S.C. § 1503. The FCIC insures farmers directly and reinsures private companies, like ProAg, to insure farmers. 7 U.S.C. § 1508(a). Jerald A. Hanson is an insurance broker doing business as Walla Walla Insurance Services and is in the business of selling crop insurance to farmers and in particular sold crop insurance to Weidert for the 2009 crop year. *CP 1-6*

Weidert was provided a preliminary policy coverage worksheet for the purpose of selling them crop insurance in November 2008 by Mr. Hanson based on MPCCI Actual Production and Yield Reports provided by ProAg. *CP 128-206*. Weidert questioned the computation provided because of local area changes that had occurred in the regulations and were assured by Mr. Hanson that the MPCCI Actual Production and Yield Reports, which came from ProAg, were accurate. *CP 196*. Based on the coverage amount provided by Mr. Hanson, Weidert planted their fields accordingly and significantly increased the acreage they had planned. *CP 196*. Weidert was subsequently informed in March 2009, after he had planted his entire wheat crop that the coverage amounts had changed because ProAg had redone their MPCCI Actual Production and Yield Reports using the correct data. *CP 182-86*. Weidert had never been informed by ProAg or Hanson that recalculations could be done after planting had already taken place. *CP 4*.

Weiderts' original claims were against defendant Hanson for negligent misrepresentation and breach of contract arising out of representations he made regarding coverage amounts that ultimately were provided under the crop insurance provided by ProAg. *CP 230-236*. When defendant Hanson filed an Answer to Weiderts' Complaint he alleged the affirmative defense of fault of non-party and then gave further explanation in his answers to deposition, in which he stated that the change of insurance coverage was due to a review and change in calculations of yields done by ProAg. *CP 163-165*. Based on the new information that ProAg had made a change to Weiderts yield calculations without notifying Plaintiff that the preliminary yield calculations were subject to change even after planting, Weidert was required to amend their Complaint to add ProAg so that ProAg could be held accountable for their part in the misrepresentation that damaged plaintiff. *CP 1-6*. The Amended Complaint includes claims for negligence, negligent misrepresentation, breach of contract, violation of the Consumer Protection Act, bad faith practices by an insurer and unfair practices in the business of insurance. *CP 1-6*. The causes of action against ProAg are based on Washington common law and statute. *CP 1-6*. These causes of action do not relate to how the ultimate loss was calculated or paid out by ProAg but relate to ProAg's actions which induce Weidert into the Contract.

Contrary to what Pro Ag has stated in their brief, the main focus of this lawsuit is not that Weidert disagrees with ProAg's calculation of the coverage benefits and premium amounts for the 2009 crop year. This case is not about a denial of a claim based on policy language or a factual determination that ProAg made in the claim process. The facts which supports the causes of actions against Mr. Hanson and ProAg stem from the misrepresentations and negligence by Mr. Hansen and ProAg which led Weidert to plant more crop than they would have had they been provided accurate information as to what the actual insurance coverage available to Weidert was going to be for 2009. The argument against ProAg for the claims of Consumer Protection violations, bad faith by insurer, and unfair practices by an insurer, is because ProAg never informed Weidert that ProAg could or would perform audits and change how they formulate the method of calculation and determination of what amount of coverage will be available to a grower, and that they did so after Weidert had planted their crops after relying on information Pro Ag had previously provided showing what the coverage amounts would be.

### **III. ARGUMENT**

#### **A. Standard of Review**

The Court of Appeals reviews a trial court's denial of a motion to compel arbitration de novo. Scott v. Cingular Wireless, 160

Wash. 2d 843, 851, 161 P.3d 1000 (2007). The party opposing arbitration bears the burden of showing the arbitration clause is inapplicable or unenforceable. Id.

**B. The FCIC Does Not Preclude a Cause of Action in State Court Against an Insurer and its Agent for Their Own Errors and Omissions.**

The Federal Crop Insurance Act (FCIA) was enacted in 1938 as part of President Franklin D. Roosevelt's New Deal legislation. Congress sought "to promote the national welfare by improving the economic stability of agriculture through a system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance. 7 U.S.C. § 1501. To further these purposes, Congress established the RMA as a wholly government-owned corporate body and agency within the Department of Agriculture. RMA was charged with implementing a nationwide crop insurance program. *See id* § 1503. Congress amended the Act in 1980 and 1994 with the goal of increasing participation in the insurance program by private-sector insurance companies. Pursuant to statute, RMA presently makes crop insurance available through two methods. First, licensed private insurance agents and brokers may sell policies issued directly by RMA. Second, RMA may reinsure private insurers that issue crop insurance policies, with

RMA paying the private insurance companies' operating and administrative costs. *See* 7 U.S.C. § 1508(a)(1).

Using its rulemaking powers, RMA has dictated the terms of the insurance contracts issued by ProAg. *See* 7 C.F.R. § 457.7. These contract are not subject to negotiation or amendment. The terms and conditions preempt any contrary state laws that would apply to other insurance contracts normally issued by private insurance companies. 7 C.F.R. § 1506(l); 7 U.S.C. § 400.352. At the same time, however, RMA has never intended to extinguish state law causes of action that may arise from tortious conduct by private companies selling RMA-approved reinsurance contracts. Nobles v. Rural Community Ins. Servs., 122 F.Supp.2d 1290, 1294 (M.D. Ala. 2000); *see also* Williams Farms of Homestead, Inc. v. Rain & Hail Ins. Serv., Inc., 121 F.3d 630, 634 (11<sup>th</sup> Cir. 1997). Section 1508(j)(2)(A) of the Act in no way prevents farmers from suing their private insurance company when that insurance company denies coverage. The statute simply confers exclusive federal jurisdiction over lawsuits against RMA or the Secretary of Agriculture but does not preempt state law claims. *See* 7 U.S.C. § 1508(j)(2)(A); *see also* Horn v. Rural Community Ins. Servs., 903 F. Supp. 1502, 1505 (M.D. Ala. 1995); Williams, 121 F.3d at 634.

In Williams Farms of Homestead Inc. v. Rain & Hail Ins. Serv., Inc., *supra*, three plaintiffs sued private insurance companies after their crop loss claims under their MPCCI policies were denied pursuant to the policies. Id. at 631. The court found that “Congress intended to leave insured’s with their traditional contract remedies against insurance companies. Such remedies include a state law breach of contract claim ... The existence of a claim against a private reinsured company is therefore consistent with the scheme of the FCIA.” Id. at 635.

The FCIA does not specifically preclude a cause of action in state court against an insurer and its agent for its own errors and omissions. Hobbs v. IGF Insurance Company, 834 So.2d 1069 (La. App. 3 Cir. 2002). While the FCIC provides indemnity for the errors and omissions of the FCIC, it does not provide indemnity for the errors and omissions of the reinsured company and its agent. Id. The FCIA contemplates that private insurance companies will be sued and will have to pay when they are at fault:

The Board [of Directors of the FCIC] shall provide [reinsured] agents and brokers with indemnification, including costs and reasonable attorney fees, from the [FCIC] for errors or omissions on the part of the [FCIC] or its contractors *for which the agent or broker is sued or held liable, except to the extent the agent or broker has caused the error or omission.*

7 U.S.C. § 1507(c) (Emphasis added).

Additionally, federal courts have consistently held they possess no federal subject matter jurisdiction to entertain state law claims against an insurer and its agent even though the policy sued on is one reinsured by the FCIC. Id. Federal courts have routinely ruled state, not federal, court is the proper venue for a state law claims against and insurer. Id. Federal courts have also held that the Federal Arbitration Act, on which ProAg relies, does not provide federal jurisdiction absent an underlying civil action that is properly in federal court. Id. Neither the legislative history predating the adoption of the FCIA nor the language found in the Act indicates Congress intended to preclude suits against insurers and its agents for their own errors and omissions. It is telling that ProAg has not attempted to transfer this case to federal court.

The FCIA does not wholly preempt state law; rather, it preempts law inconsistent with the purpose of the Act. Therefore, Weiderts' state law causes of action, which are not contrary to the purpose of the FCIA, are not preempted by the FCIA or the FCIC's regulations.

**C. The State Court Causes of Action in this Case are outside the issues of the Arbitration Clause.**

A party is required to arbitrate only those disputes it has agreed to resolve in arbitration. Meat Cutters Local 494 v. Rasauer's Super Markets, Inc., 29 Wash. App. 150, 154, 627 P.2d 1330 (1981) (*citing*

Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 241 (1962); Volt, 489 U.S. 468 (1989). The obligation to submit an issue is wholly contractual and arbitrability of a dispute depends upon the terms of the agreement. Meat Cutters Local 494, 29 Wash. App. at 154. The arbitration clause contained in the policy provides that the only issues that are subject to arbitration are when the parties “fail to agree to *any determination* made by us except those specified in 20(d)(1)<sup>1</sup>....” Basic Provisions, 7 C.F.R. § 457.8, ¶ 20 (Emphasis added).

The regulation/policy does not define “determination”. 7 C.F.R. § 457.8; *see* CP 27-37. Black’s Law Dictionary defines “determination” as “a final decision by a court or administrative agency.” *Black’s Law Dictionary*, (7<sup>th</sup> ed. 1999). ProAg is attempting to have this court interpret “any determination” to mean “any dispute”, as was the broad language of the arbitration provision in AT&T Mobility LLC v. Concepcion 562 U.S. \_\_\_, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). However, there is no legal support for this court to interpret the subject language to mean that any dispute with ProAg is subject to the arbitration clause. The term “determination” is ambiguous in this arbitration clause.

“A clause in a policy is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable.”

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<sup>1</sup> Subsection (d) applies to determinations relating to “good farming practices.” This is not an issue in the underlying litigation.

Greer v. Northwestern Nat'l Ins. Co., 109 Wash.2d 191, 198, 743 P.2d 1244 (1987). “In construing the language of an insurance contract, the contract as a whole is examined, and if, on the face of the contract, two reasonable and fair interpretations are possible, an ambiguity exists.”

Nichols v. CNA Ins. Co., 57 Wash.App. 397, 400, 788 P.2d 594 (1990). “When an ambiguity in the policy exists, a meaning and construction most favorable to the insured must be applied, even though the insurer may have intended another meaning.” *Id.*, citing Riley v. Viking Ins. Co., 46 Wash.App. 828, 830, 733 P.2d 556 (1987). As was noted above, RMA has the rulemaking power to dictate and define the terms of the insurance contracts that are reinsured by FCIC. RMA defines over 125 terms in 7 C.F.R. § 457.8, yet did not define a term that is important enough to cause an insured to be forced into arbitration on some or all of their causes of action against a private insurance company that happens to be reinsured by FCIC.

In construing an insurance policy, the court gives the policy language the same “fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.” Queen City Farms, Inc. v. Central Nat'l Co., 126 Wn.2d 50, 65, 882 P.2d 703 (1994); 891 P.2d 718. “Undefined words and terms used in an insurance policy should be understood in their ordinary, plain, and popular sense.”

Heringlake v. State Farm Fire & Cas. Co., Inc., 74 Wash.App. 179, 185, 872 P.2d 539 (1994). Accordingly, the court should not read “any determination” to mean “any dispute” with ProAg.

In determining whether a particular claim falls within the scope of the parties’ arbitration agreement, the courts focus on the factual allegations in the complaint rather than the legal causes of action asserts. Genesco. Inc. v. T. Kakiuchi & Co., Inc., 815 F.2d 840, 846 (2<sup>nd</sup> Cir. 1987). In that case, the arbitration clauses at issue had language that said “all claims and disputes of whatever nature under this contract”, “arbitration of all disputes,” and “any controversy arising out of or relating to this contract ..., including any claim for damages”. The court looked at each fact pattern for each cause of action to determine whether each cause of action was subject to arbitration or could proceed in court.

The RMA issues Final Agency Determinations interpreting certain sections of the Common Crop Insurance Policy. The RMA was asked to interpret section 20(b) of the Common Crop Insurance Policy Basic Provisions, published in 7 C.F.R. § 457.8 regarding what a “determination” was for the purpose of that subsection. FAD-151 stated “FCIC agrees that acceptance of the application is not likely a determination for the purposes of section 20(a) of the Basic Provisions that starts the one year time period for appeal. The one year date starts from the date the policyholder received a

determination to which the policyholder disagrees.” FAD-151, *date of issue* February 13, 2012.

Here, the causes of actions are based on representations by ProAg which Weidert relied upon in planting his crop. *CP. 1-6*. The damages came from the recalculation of the MPCCI Actual Production and Yield Report which took away the “cup” protection in calculating the yields in the previous MPCCI Actual Production and Yield Reports. *CP 184*. Weidert does not argue that ProAg should have still used the “cup” protection, does not argue that the new calculation was incorrect according to the new policy or other federal regulations, and does not argue or dispute that ProAg was incorrect in ultimately paying the crop loss indemnification that they did. The facts alleged in the Amended Complaint do not dispute the determination of coverage amount pursuant to the new policy or other federal regulations. ProAg did not dispute the loss and Weidert does not dispute the amount that was paid to them for the 2009 crop loss year. Weidert’s causes of action stem from the errors and omissions of Jerald Hanson and ProAg based on misrepresentations and false inducements which caused Weidert damages by way of lost insurance proceeds and crop revenue.

The trial court’s order is not contrary to the arbitration clause and does not affect the parties’ ability to arbitrate determinations made by

ProAg in regard to issues of coverage amounts and premium amounts for the 2009 crop year. The trial court's order only allows Weidert to proceed in state court on its claims including Consumer Protection violations, bad faith, and unfair practices by an insurer, and other claims that do not related to "determinations" made by ProAg.

All of the cases cited by ProAg in which the arbitration clause was enforced dealt with factual determination of the policy language. In Hoefst v. Rain & Hail LLC, 2001 WL 34039497 (D.Ore. Oct. 31, 2001), the claim was not paid based on failure to comply with farming practices in the policy. The insured argued that the arbitration clause applied but that it should not have been enforced because it violated the constitutional right to a jury. In Ledford Farms, Inc. v. Fireman's Fund. Ins. Co., 184 F. Suppl. 2d 1242 (S.D.Fla. 2001), the claim was not paid based on a dispute over a policy provision. In Crook v. Fireman's Fund AgriBusiness, Inc., 2000 WL 33650721 (W.D. La. Sept. 5, 2000) the denial of coverage was based on a factual determination that the insured failed to follow required good farming practices. In Nobles v. Rural Cmty. Ins. Servs., 122 F. Suppl. 2d 1290 (M.D. Ala. 2000), the denial of coverage was based upon policy language regarding farming practices. The court divided plaintiff's claims into two categories, "factual determinations" (whether the farm land at issue was covered by the policy) and state claims for tortious conduct by the insurer. Id. The court

declared that once the factual dispute was resolved, the plaintiff could then elect to pursue their common law claims in state court. Id. at 1293-94.

Here, Weidert is not arguing that ProAg has incorrectly calculated the coverage amounts that have already been paid out pursuant to the new policy or other federal regulations. The causes of action stem from damages that occurred based on misrepresentation by ProAg and Hanson for acts and representations that induced Weidert to plant more crop than he would have without the misrepresentations and which caused him damages. Weidert was subject to a bait and switch which he attempted to avoid by asking the Defendants to confirm their calculations. They confirmed their position only to then change their position after Weidert could not back out. Therefore, these causes of action are outside the arbitration clause and the trial court correctly denied the motion to compel.

C. **The trial court's decision is consistent with the Federal Arbitration Act.**

ProAg argues that the Federal Arbitration Act mandates arbitration of this action. However, federal courts have held the provisions of the FAA only apply if the court would have had subject matter jurisdiction over the underlying civil action. Rio Grande Underwriters, Inc. v. Pitts Farms, Inc., 276 F.3d 683, 685 (2001). The FAA is not an independent source of jurisdiction; a party may obtain relief in federal court under the

FAA only when the underlying civil action would otherwise be subject to the court's federal question or diversity jurisdiction. Id. (citing 9 U.S.C. 4).

In Volt Info. Sciences, Inc. v. Bd. Of Trustees of Leland Stanford Jr. Univ., the arbitration clause in dispute stated “[a]ll claims, disputes and other matters in question between the parties to this contract, arising out of or relating to this contract or the breach thereof, shall be decided by arbitration...” 489 U.S. 468, 471, ft. 2 (1989). In Volt, the Supreme Court held that the Federal Arbitration Act did not preempt California law which permits court to stay arbitration pending resolution of related litigation involving third parties not bound by arbitration agreement where parties agreed in contract to abide by state rules of arbitration. Id. at 477-79. The Court stated that “the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that “arbitration proceed *in the manner provided for in [the parties’] agreement.*” Id. at 475 (citing 9 U.S.C. §4 (emphasis in original)).

Furthermore, the Federal Arbitration Act is virtually identical to the Uniform Arbitration Act as adopted in Washington, an arbitration clause in an agreement is considered “valid, enforceable, and irrevocable **except upon a ground that exists at law or in equity for the revocation of a contract.**”

Compare RCW 7.04A.060 (Emphasis added) and 9 U.S.C. § 2 (“shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”). The FAA itself states that the court must look at issues of equity in deciding whether to enforce an arbitration clause.

In this case, equity should dictate and allow Weidert to pursue their state actions against Jerald Hanson and ProAg. The causes of action stem from the same fact pattern. Additionally, the causes of actions relate not to factual determination of policy interpretation or policy decisions, but from the deceptive, fraudulent and negligent acts of a private insurance company and an insurance agent.

The insurance agent Jerald Hanson is not a party to the insurance policy and is therefore, not subject to the arbitration clause contained in the policy. The potential of judicial economy and avoidance of inconsistent results justify proceeding in one action rather than two. See Tompson v. State Dept. of Licensing, 138 Wn.2d 783, 795, 982 P.2d 601 (1999). RMA, though its rulemaking authority, could have remedied this issue by making the insurance agent a party to the policy or by requiring an agent who sells a FCIC reinsured policy to be subject to any dispute that falls within the arbitration clause.

In addition, CR 19(a), which states in pertinent part, has direct application:

A person who is subject to the service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any other persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Applied in the instant case, CR 19(a) requires joinder of ProAg because all claims that have been brought by Weidert arise from the same factual pattern involving misrepresentation, not interpretation of the policy language. It would be inequitable under the circumstances in this case to require Weidert to pursue arbitration to obtain complete relief.

Equity clearly urges in favor of one lawsuit in the county where the contract was made and the subject farm properties lie. The underlying action cannot and will not be avoided by the requested arbitration, and thus the policy set forth in Mendez v. Palm Harbor Homes, 111 Wash. App. 446, 45 P.3d 594 (2002) that policy favoring arbitration is “granted on the proposition that arbitration allows litigants to avoid the formalities, expense and delays inherent in the court system” will not be avoided by this request

for arbitration. Mr. Hanson will remain a defendant in the Washington action even if the courts grant ProAg's motion to compel arbitration. Thus, judicial economy will be ignored, and inconsistent results may result. Washington law supports the trial court's decision to deny Petitioner's motion to compel arbitration. Further, ProAg has not cited any cases with similar facts in which an insurance company represented incorrect information which the insured then relied upon prior to planting, also involved a third party that was not subject to the arbitration clause, and thus was required to look at equitable arguments such as judicial economy and the likelihood of separate actions with inconsistent results.

Even under the FAA, courts determining the validity of arbitration provisions look to ordinary state-law principles governing the formation of contracts. Therefore, Washington law would be applied to determine whether Weiderts' claims against ProAg must proceed under binding arbitration. *See Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9<sup>th</sup> Cir. 2002); *see also Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 321, 211 P.3d 554 (2009).

While there is a strong public policy favoring arbitration as a means to settle disputes, the underlying purpose of that policy "is to avoid the formalities, the expense, and the delays of the court system." *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 454, 45 P.3d 594 (2002).

That policy is not served by granting ProAg's motion, as such would clearly necessitate the maintenance of two separate actions in two separate forums to yield a complete resolution to the dispute. The purpose of "judicial economy" would not only be frustrated, it would be thrown out the door. Furthermore, the issues that are the subject of this lawsuit involve issues that are outside the policy itself.

In Mendez, the court was particularly influenced by the "prohibitive entry costs" the plaintiff would have to pay in deciding that a court trial rather than arbitration was the appropriate forum. 111 Wn. App. at 460. In support of its ruling, the court stated:

Equity includes power to prevent the enforcement of a legal right when to do so would be inequitable under the circumstances. Thisius v. Sealander, 26 Wn.2d 810, 818, 175 P.2d 619 (1946). Under the proper "conditions and circumstances" warranting equity, "equity will assume jurisdiction for all purposes, and give such relief as may be required." Income Prop. Inv. Corp. v. Tresethen, 155 Wn. 493, 506, 284 P. 782 (1930). The goal of equity is to do substantial justice to contracting parties. Shoemaker v. Shaug, 5 Wn. App. 700, 704, 490 P.2d 439 (1971). Mr. Mendez sought and received equity below based mainly upon the prohibitive entry costs of arbitration compared to the entry costs of trial.

*Id.* at 460.

Weidert has submitted this dispute to arbitration through AAA and submitted the initial entry fees which are based on the amount in dispute in order to maintain their right to arbitration. This was done in order to comply

with the time limitation set forth in the policy. To date, Weidert has paid over \$4,750.00 in order to maintain their filing date of the request for arbitration pursuant to the crop insurance policy provisions. In order to move forward with the arbitration, Weidert would need to submit another \$2,500 as a final fee in order to proceed with arbitration through AAA. In addition to those extreme costs that Weidert must pay in order to pursue arbitration, there are the more relevant factors of judicial economy, duplicative costs, and the potentially inconsistent results that may come from litigating certain facts in arbitration versus the state court action against the insurance agent. There is no mechanism in which the court could compel Jerald Hanson to participate in the arbitration that ProAg is requesting. Therefore, Weidert would have to litigate in both actions under essentially the same fact pattern. Even if the court stays the action against the insurance agent, that action will only prolong Weidert from obtaining complete relief on all his causes of action.

The Federal Arbitration Act, along with the Washington Uniform Arbitration Act, allows the trial court to revoke an arbitration clause based on equity. Although Weidert believes the actions against ProAg are not covered by the arbitration clause, the trial court could still invalidate the clause based on equity and the unique facts of this case. Therefore, the trial

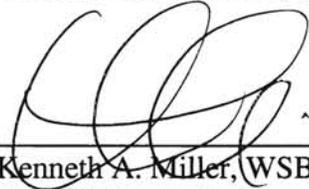
court's decision denying the motion to compel arbitration was correct and should be upheld.

#### **IV. CONCLUSION**

The arbitration clause that is in dispute only states that "determinations" made by ProAg are subject to arbitration. The trial court's order denying Petitioner's motion to compel arbitration is supported by Washington State law, as well as the FAA. The state claims for Consumer Protection violations, Bad Faith by Insurer, and Unfair Practices do not fall under the arbitration clause and issues of equity supports the trial court's order denying arbitration. Therefore, Respondents Weidert respectfully requests this Court affirm the trial court's denial of the motion to compel arbitration.

DATED: May 4, 2012

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 1<sup>st</sup> day of May, 2012, I caused a true and correct copy of the foregoing document, "Brief of Respondent", to be mailed by United States mail postage prepaid to the following counsel of record:

Counsel for Appellant-Defendant:

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DATED this 1<sup>st</sup> day of May, 2012, at Kennewick, Washington.

  
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Lisa Sherman